

CEPHAS CHIKWIRA
and
MEMORY MAHASO
and
INNOCENT NEZUNGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 23 June 2015 & 10 May 2017

Criminal Appeal

W Chinamora, for the appellants
R Chikosha, for the respondent

HUNGWE J: The three appellants were charged with criminal abuse of office as public officers as defined in s 174 (1) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. They were all sentenced to pay a fine of US\$450-00 or in default of payment 3 months imprisonment. In addition 12 months imprisonment was wholly suspended for five years on the usual condition of good behaviour. They appeal against conviction only.

The appellants raised six grounds of appeal which were framed as follows:

- “(1) The learned magistrate erred or misdirected himself on convicting appellants on the basis that they had not sought three quotations when that was not part of the charge.
- (2) The learned magistrate erred on convicting appellants in circumstances where the State had not formally applied to amend the alternative charge.
- (3) The learned magistrate erred on convicting appellants in circumstances where no evidence was led to prove that the appellants were required to obtain at least three quotations thus the State had failed to prove beyond a reasonable doubt that they were guilty of the offence charged.
- (4) The learned magistrate erred by failing to adopt the correct judicial assessment of all the evidence adduced before it (sic). See *S v Tambo* 1007 (2) ZLR 32 (H)
- (5) The learned magistrate erred by relying and convicting appellants on the evidence of a drunk witness, Nyasha Muzavazi.
- (6) The learned magistrate erred or misdirected himself by dismissing the appellants’ explanation offered to discharge the evidential burden on them.”

The facts upon which the appellants were convicted can be summarised as follows. The appellants were part of the original five suspects who were initially charged with fraud.

The other two were acquitted at different stages of the trial. The first and second appellants were lecturers at the School of Hospitality and Tourism (“SCHOTO”) where the third appellant was the director. It was accepted during trial that the school of hospitality and tourism was a department of the Bulawayo Polytechnic although they each operated separate banking accounts. These institutions are public institutions. The first and second appellants co-signed a document in which they represented Bulawayo Polytechnic as Principal and Vice-principal in a tender bid to provide certain catering services to the Zimbabwe Schools Examinations Council (“Zimsec”) in Bulawayo. When they won the tender, they paid several entities which they assembled in an effort to fulfil their contractual obligations to Zimsec. Among the entities they sub-contracted was a catering outfit going by the name Makmuz Caterers & Tours (Pvt) Ltd (“Makmuz”). They paid US\$63 000-00 to this outfit. The basis for selecting to engage this outfit was that it is run by former students of the SCHOTO. The Procurement Regulations in Statutory Instrument 171 of 2002 made under Procurement Act [*Chapter 22:14*] (“the Act”) requires any expenditure in excess of US\$50 000-00 to be put out to tender. The appellants won a tender, on behalf of SCHOTO, whose value was over US\$115 000-00. The evidence led at trial shows that SCHOTO is a department of the Ministry of Higher and Tertiary Education. Therefore by the definition section in the regulations, SCHOTO is a procurement entity to which the regulations apply. The appellants then sub-contracted another entity known as Makmuz to provide the actual services for which they had bided for and won. The Procurement (Amendment) Regulations 2008, (No 16) require that Zimsec awards tenders only to entities from a list of approved caterers. Whilst Bulawayo Polytechnic, by default SCHOTO, was among the list of approved caterers, Makmuz was not. The trial court in its reasoning concluded that the appellants showed favour to Makmuz, by sub-contracting the contract which they had secured from Zimsec when in fact it was not listed as an approved caterer. Both Zimsec and SCHOTO are procuring entities. In so doing, they acted contrary to their duties as public officers. In essence, an unregistered entity ended up benefitting in circumstances where it should not have so benefitted due to the favour that was extended to it by the appellants.

The appellants do not deny that they sub-contracted their winning bid under Bulawayo Polytechnic to Makmuz in which one of their former co-accused had an interest. They contended however, that such sub-contracting was not contrary to their duties as public officers.

Section 174 provides:

“174 Criminal abuse of duty as public officer

- (1) If a public officer, in the exercise of his or her functions as such, intentionally:-
(a) does anything that is contrary to or inconsistent with his or her duty as a public officer; or
(b) omits to do anything which it is his or her duty as a public officer to do; for the purpose of showing favour or disfavour to any person, he or she shall be guilty of criminal abuse of duty as a public officer and liable to a fine not exceeding level thirteen or imprisonment for period not exceeding fifteen years or both.
- (2) If it is proved, in any prosecution for criminal abuse of duty as a public officer, that a public officer, in breach of his or her duty as such, did or omitted to do anything to the favour or prejudice of any person, it shall be presumed, unless the contrary is proved, that he or she did or omitted to do the thing for the purpose of showing favour or disfavour, as the case may be, to that person.
- (3) For the avoidance of doubt it is declared that the crime of criminal abuse of duty as a public officer is not committed by a public officer who does or omits to do anything in the exercise of his or her functions as such for the purpose of favouring any person on the grounds of race or gender, if the act or omission arises from the implementation by the public officer of any Government policy aimed at the advancement of persons who have been historically disadvantaged by discriminatory laws or practices.”

In order to secure a conviction, the State needed to prove that:

- (a) the appellants, at the time, were public officers;
- (b) the appellants had done anything that is contrary to or inconsistent with their duty as public officers:- or
- (c) they omitted to do anything which it was their duty to do as public officers for the purpose of showing favour or disfavour to Makmuz caterers.

The appellants do not take issue with their status as public officers and the State did not have to prove this aspect of the offence charged. There was no disputing that the tender regulations under which SCHOTO through the Polytechnic, had won the tender, required that disbursements be made to a registered caterer. The evidence led in court was that the appellants sub-contracted the service provision to Makmuz. In the Memorandum of Understanding between SCHOTO and the sub-contracted entity, Makmuz is described as “an approved catering service provider.” The signatory to the sub-contract are the third appellant and the erstwhile co-accused Chenjerai Makiwa who was acquitted during trial as it was clear he had been charged separately elsewhere for the same offence.

The court *a quo* came to the conclusion that the appellants acted contrary to their duties as public officers. The court relied on the fact that they did not settle on Makmuz after going to tender. Although this was not part of the State case, the court reasoned that it could not ignore such an open fact. The appellants argued that it was not necessary to go to tender

for the sub-contract. I have already demonstrated that the regulations definition catch SCHOTO in the category of procuring entities thereby requiring the floating of tender for services above the US\$50 000, 00 threshold. That may well be so but there is however another basis of arriving at the same conclusion which is that they acted contrary to their duties as public officers. Where expenditure above a certain threshold requires the institution to go to tender and that institution does not do that, the failure to go to tender may provide the basis upon which the reverse onus in s 174 (2) kicks in. For the princely sum above US\$50 000-00 good administration and accounting procedures required, at least for public funds, that three quotations be obtained before a supplier is chosen. The criteria used by the appellants was that they wanted to promote the fledgling business of former students. They still could have done so after securing the three quotations, as is the norm with public finance management. Whilst this was not put to the witnesses during cross-examination, it arises out of the fact that the section is intended to promote good administration. In any event SCHOTO is a procuring entity to which the Procurement regulations apply. (Section 4 of the regulations). Therefore at the very least, the best practice in any public procurement process requires either going to tender or seeking three quotations from the target services providers. Had they sub-contracted with an entity which was listed on the list of approved caterers by Zimsec, the appellants would have had a leg to stand on. Unfortunately, this entity is not registered and the process used to settle upon it remained opaque. The only inference is that the appellants misrepresented that the outfit was registered and omitted to secure three quotations in order to show favour to Makmuz. The evidence led at trial clearly proved all the essential elements of the alternative offence for which the appellants were convicted of. Before concluding, I must make some comments on the grounds of appeal.

As for the grounds of appeal, I must observe that they do not meet the requirement set out in r 22 (1) of the Supreme Court (Magistrates Court) Criminal Appeals Rules, 1979. That Rule provides:

Rule 22 (1) of the Appellate Division (Magistrate's Court) (Criminal Appeal) Rules, 1979 (S.I. 504 of 1979) reads:

“The appellant shall, within fourteen days of the passing of sentence, or, where a request has been made in terms of sub-rule (1) of rule 3 of Order IV of the Magistrates Courts (Criminal) Rules, 1966, within seven days of the receipt of the judgment or statement referred to in that rule, whichever is the later, note his appeal by lodging with the clerk of the court a notice in duplicate setting out clearly and specifically the grounds of the appeal.....”

In *S v McNab* 1986 (2) ZLR 280 it was held that a ground which read:

“The Learned Trial Magistrate erred in fact and in law in holding that the State had proved the appellant was so drunk as to be incapable of having proper control of his motor vehicle.”

.....did not set out “clearly and specifically the grounds of appeal.” If the ground of appeal is that the magistrate erred in law this should be stated and the particular mistake in law, which the magistrate is alleged to have made, should be set out. In order for a ground to comply with the rules of this court, that which the appellant is attacking in the judgment of the convicting court must be set out in the manner laid out by the Rule. The grounds of appeal drawn in respect of the present appeal are bad in law. The learned magistrate could well be within his rights to decline to respond to them as they are a nullity. I would have expected counsel for the respondent to have taken this point at the outset of preparation of heads of argument. Counsel for the appellants struggled with his submissions because the defect made it so hard to argue the appeal as set out in the notice and grounds of appeal. The time has come for this court to decline to hear such appeals as this disregard of the Rules unnecessarily burdens this court with meritless appeals.

In the result the appellants’ appeal against conviction is dismissed in its entirety.

BERE J agrees.....

Muvirimi Law Chambers, legal practitioners for the appellants
National Prosecuting Authority, legal practitioners for the State